No. 12586

In The United States Court of Appeals

For the Ninth Circuit

OSCAR ANDERSON and ALASKA FISHERMEN'S UNION, *Appellants,*

vs.

M. P. MULLANEY, Commissioner of Taxation of the Territory of Alaska, *Appellee.*

Upon Appeal From the District Court for the Territory of Alaska, Division Number One

BRIEF FOR THE APPELLANTS

ROY E. JACKSON & CARL B. LUCKERATH
WM. L. PAUL, JR.,
For Appellants.

No. 12586

In The United States Court of Appeals

For the Ninth Circuit

OSCAR ANDERSON and ALASKA FISHERMEN'S UNION, *Appellants,*

vs.

M. P. MULLANEY, Commissioner of Taxation of the Territory of Alaska, *Appellee.*

Upon Appeal From the District Court for the Territory of Alaska, Division Number One

BRIEF FOR THE APPELLANTS

ROY E. JACKSON & CARL B. LUCKERATH
WM. L. PAUL, JR.,
For Appellants.

INDEX

INDEX OF CASES

Pages

INDEX TO STATUTES

In The United States
Court of Appeals
For the Ninth Circuit

No. 12586

OSCAR ANDERSON and ALASKA FISHERMEN'S UNION, *Appellants,*

vs.

M. P. MULLANEY, Commissioner of Taxation of the Territory of Alaska, *Appellee.*

Upon Appeal From the District Court for the Territory of Alaska, Division Number One

---

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court, as yet unreported, will be found at R. 14-18.

JURISDICTION

This is a suit to enjoin appellee from enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, against non-resident fishermen and for a decree and judgment declaring said Act unconstitutional and invalid at least insofar as the same requires the payment of a $50.00 license fee by non-resident members of ap-

pellant, Alaska Fishermen's Union, and for such other and further relief as may appear just. The Act involved imposes a license fee of $5.00 on residents in certain enumerated categories related to the fishing industry in Alaska and a license fee of $50.00 for each non-resident engaged in the same categories. Findings of Fact, Conclusions of Law and Decree and Judgment were entered in this cause April 18, 1950, sustaining the validity of the Act and dismissing the Complaint and Amended Complaint therein filed. (R. 18-24). Notice of General Appeal and Cost Bond on Appeal were filed May 15, 1950, and Designations of Portions of the Record were filed May 16, 1950. (R. 25-28). The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, §4, 31 Stat. 322, as amended, 48 U.S.C.A. §101. The jurisdiction of this court rests on §1291 of the New Federal Judicial Code.

QUESTION PRESENTED

Whether Chapter 66, Session Laws of Alaska, 1949, is a valid exercise of the taxing authority of the Territory.

STATEMENT OF POINTS

The Statement of Points (R. 44-45) may be summarized as follows:

1. That Chapter 66 of the Session Laws of 1949 (approved March 21, 1949) of the Territory of Alaska, enacted by the territorial legislature in the 1949 session, in its entirety and as to each and every section thereof, is unlawful and unconstitutional in that it violates Section Nine of the Organic Act of the Territory of Alaska; Article

1, Section 8, and Article 3 (4), Section 2, of the Constitution of the United States and the 14th Amendment to the Constitution of the United States.

2. That the testimony and evidence in the record does not substantiate the finding of the District Court that approximately ninety per cent (90%) of the cost of collecting the license tax is incurred in attempting to collect said tax from non-resident fishermen.

3. The court erred in its conclusions Nos. I, II and III to the effect that Chapter 66, S.L.A. 1949, does not contravene the Organic Act and United States Constitution and Laws as enumerated in Point I, and that the non-resident license tax is reasonable and not excessive and rests on substantial differences bearing a fair and reasonable relation to the object of the legislation.

4. The court erred in its conclusion No. IV declaring Chapter 66, S.L.A. 1949, was a valid Act and in entering judgment and decree dismissing plaintiff's complaint and amended complaint.

STATEMENT OF CASE

This action was instituted May 23, 1949, by appellant, Alaska Fishermen's Union, a labor union chartered by the International Fishermen and Allied Workers of America, affiliated with the Congress of Industrial Organizations, by and through Oscar Anderson, its secretary-treasurer, under the authority of his office pursuant to the instructions of the Union, on behalf of its members, who are classified as fishermen and who are classed as non-residents of Alaska, to enjoin the enforcement of Chapter 66, S.L.A. 1949, at least with respect to the non-resident license fee, and to have the entire Act, or at least that portion relating to non-

residents, declared invalid. (R. 2-9). The legislature of the Territory of Alaska, during its regular session in 1949, enacted a revenue measure, identified as Chapter 66 of S.L.A. 1949, which was approved by the Governor on March 21, 1949, and became a law of the territory. It amended a previously existing law by increasing the license fees required of non-resident fishermen and various employees and individuals connected with the processing and handling of salmon and other fishery resources in the Territory of Alaska from $25.00 to $50.00 per annum and license fees of the resident fishermen in the same classifications from $1.00 to $5.00 per annum. During the summer of 1949 approximately 3000 members of appellant union, who were non-residents of Alaska, living principally in California, Oregon and Washington, and who were employed by fish packing companies within the Territory of Alaska during the salmon season, were obliged to obtain and pay the $50.00 license required under the Act involved. The union also represents some 2000 resident fishermen, who fish in Alaska each fishing season and who were licensed in the same manner on payment of a $5.00 license fee. Various interrogatories were submitted to appellee, M. P. Mullaney as Commissioner of Taxation of the Territory of Alaska, by counsel for appellants, on February 28, 1950, the answers to which reveal that appellee is unable to allocate the cost or the services necessary, usual or required with respect to the fishermen's license taxes involved, either in the aggregate or

as to residents and non-residents respectively. (R. 29-42). The testimony of seven resident fishermen was perpetuated pursuant to minute order and stipulated notes January 19, 1950, and reflects individual annual net earnings over the past several years averaging in the neighborhood of $2250.00. The testimony indicates the average earnings of non-residents may be slightly higher. (R. 10-14, 29). The matter came on for trial March 16, 1950, at Juneau, Alaska, at which time witness Oscar Anderson for appellant and Thomas Parke, Special Deputy Enforcement Officer, for the Alaska Department of Taxation, for appellee, were examined at length. (R. 46-152). Following argument of counsel the court took the matter under advisement and rendered his written opinion March 21, 1950, (R. 15-18), in which he sustained the validity of the Act. Findings of Fact and Conclusions of Law were entered in accordance with the court's opinion. (R. 18-23), and on April 18, 1950, a judgment and decree was entered sustaining the validity of the Act and dismissing plaintiff's complaint and amended complaint. (R. 23-24). This appeal followed (R. 25).

SUMMARY OF ARGUMENT

I

The finding of the trial court that ninety per cent (90%) of the cost of collecting the tax under Chapter 66, S.L.A. 1949, is incurred in collecting and attempting to collect the non-resident taxes is wrong and unsupported in the record.

II

Subparagraph 2, Chapter 66, Session Laws of Alaska, 1949, fails to provide the uniformity and equality demanded by the Organic Act, the 14th Amendment and the Civil Rights Act.

The Civil Rights Act (8 U.S.C.A. Sec. 41) imposes upon territories of the United States the same requirement for equality and uniformity of taxes, licenses and exactions of every kind between the citizens of the territory and any other citizen of the United States as is required under the Constitution and the 14th Amendment by each state with respect to the citizens of other states. This is expressly recognized in the case of *Martenson v. Mullaney,* 85 Fed. Supp. 76 (1949), and the recent decision of the Ninth Circuit Court in *Alaska Steamship Company v. Mullaney* (C.C.A. 9th, March 1, 1950), 180 Fed. (2d) 1805. The effect of these decisions and the application of the Civil Rights Act to the enactment involved in this case is to expand the narrow rule of restraint on the taxing power of territorial legislatures recited in *Anderson v. Smith,* 71 Fed. (2d) 493.

The imposition of a license tax on a non-resident ten times as great as that on residents cannot be justified within the restrictions of the Civil Rights Act and the 14th Amendment requiring equality and uniformity in the imposition of taxes and licenses and is an attempt at discriminatory classification. *Toomer v. Witsell,* 334 U.S. 385 (1948).

III

The act is invalid as a burden on Interstate Commerce. The Salmon Packing industry is entirely interstate, *McComb v. Fisheries Co.,* 174 Fed. (2d) 74 (1949). Chap. 66, S.L.A., 1949, extends beyond those directly engaged in catching the fish, to those receiving the fish, tending traps, crews of tenders, etc. It prohibits the purchase of fish from an unlicensed person. This constitutes an encumbrance and burden on the operation of the interestate business by the companies engaged therein, whether it is treated as a tax upon the privilege of doing interstate business within the state or as a tax upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself. *Memphis Natural Gas. Co. v. Stone,* 334 U. S. 314 (1948).

ARGUMENT

I

THE FINDING OF THE TRIAL COURT THAT 90% OF THE COST OF COLLECTING THE TAXES UNDER CHAPTER 66, S.L.A. 1949, IS INCURRED IN COLLECTING OR ATTEMPTING TO COLLECT THE NON-RESIDENT TAX, IS WRONG AND UNSUPPORTED IN THE RECORD.

The Judge of the District Court found that 90% of the cost of collecting the fisherman's license tax under Chapter 66, S.L.A. 1949, is incurred in collecting or attempting to collect said taxes from non-resident fishermen (Finding number 9, R. 21; opinion R. 17). A scrutiny of the Record fails to disclose any support for this holding. The witness Thomas Parke, being the only witness offered who made any reference to differences

in cost or problems of collection, disclaimed any knowledge of the expense, actual or relative, of the collection of the tax involved as between residents and non-residents. (R. 148-149). He also stated that there was no way of determining how many non-resident trollers or purse seiners come to Alaska (R. 124-125).

This testimony is well supported by the Answer of Commissioner Mullaney (R. 31-32) to interrogatories propounded by Plaintiff February 4, 1950 (R. 33-34) in which he clearly states that he cannot from his files and records determine the services or costs attributable to collection respectively of resident and non-resident fishermen's license taxes, and his answer (R. 29-30) to interrogatory No. (3) of set number "3" (R. 40) is couched in general terms which fail completely to indicate any specific additional cost or service attributable solely to non-resident fishermen, or to even estimate the relative costs of each type of collection, in their entirety or on a basis of the comparative cost of collecting each type of tax.

Contrariwise the record indicates there has been but a single paid agent relegated to the enforcement of the license tax involved, and that, though his work might not be so onerous, his employment would nevertheless be required if only resident license fees were collected. (R. 120-121). Further, it appears that a very substantial portion of the issuance of taxes and collection is accomplished directly through the cannery personnel and by a process of withholding. (R. 50, 72,

97, 110). The resident agents in the various fishing villages and towns are paid on a commission basis, and are required as well for resident as for non-resident persons covered. (R. 97, 147-148).

Apprehension of non-resident violators is effected almost exclusively through the voluntary services and reports by residents, who appear only too willing and anxious to assist the enforcement officer. (R. 99, 103, 126).

The finding of the Court evidently is derived solely from the following testimony at the close of the direct examination of witness Parke:

> "Q. Have you formed an opinion as to whether it is more difficult to enforce this license tax against non-resident fishermen as compared with resident fishermen?
>
> A. By far; yes. At least ninety per cent of the *work* would be with the non-resident." (R. 120, italics supplied.)

Obviously the Court in his finding has transposed the word *cost* for the word *work*. There is not necessarily a direct correlation between the two items, and while from his testimony it appears that the witness concerns himself principally with seeking out non-resident violators, there is nothing to suggest that the collection cost is materially greater than would be incurred if all collections were from resident fishermen. A fair appraisal of this witness' testimony and the entire record would indicate the cost attributable to collecting non-resident licenses is confined to the operating cost on Parke's collection boat when pursuing

special investigation leads, and couldn't conceivably increase the relative cost of collection of non-resident licenses to more than half again the cost of collecting resident fees.

This is a most vital error of fact; particularly in view of the language in the recent authoritative decision of *Toomer v. Witsell,* 334 U. S. 385, as follows:

> ". . . The State is not without power . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose. . . ."

II

THE ACT OF MARCH 21, 1949, DESIGNATED AS CHAPTER 66, SESSION LAWS OF ALASKA, 1949 IS INVALID.

A. The Act Is Invalid Because It Fails to Provide the Uniformity and Equality Demanded by the Organic Act, the Fourteenth Amendment and the Civil Rights Act.

This court in the recent decision of *Alaska Steamship Co. v. Mullaney* (C.C.A. 9th, March 1, 1950), 180 Fed. (2d) 805, stressed the point that the constitution followed the flag to Alaska, referring to recitals in the Organic Act (48 U.S.C.A. Secs. 23 and 78) and concluding:

> "We therefore approach the arguments made with respect to alleged inequality, arbitrary classifications, and attempted impact on incomes received outside Alaska with the assumption that the validity of the Act must be judged by the same standards of due process and of equal protection that would be applied in the case of similar legislation by a state. . . ." (p. 818).

It also makes reference to the Civil Rights Act (8 U.S.C.A. Sec. 41) in a footnote.

The cases of *Haavik v. Alaska Packers Assn.,* 263 U. S. 510; *Freeman v. Smith,* 44 Fed. (2d) 703, Id., 62 Fed. (2d) 291, and *Anderson v. Smith,* 71 Fed. (2d) 493 reached a result expressed in the latter citation:

> "It is clear then that so long as the license tax imposed by the territorial Legislature upon the citizens of the U. S., who are not residents of Alaska is not so exorbitant as to practically prohibit, or so unreasonable as to interfere with, the exercise of the right granted by Congress, it is within the power of the territorial legislature" (p. 495).

This position, however, stems from the holding of the Supreme Court in the *Haavik* decision to the effect that Sec. 2, Art. 4 of the Constitution, and by analogy the 14th Amendment guarantees uniformity and protection of privileges and immunities as among the citizens of the several *states,* but not as between *territorial* citizens and citizens of the *states.* It is only on this line of reasoning that the court can arrive at the narrow restraint quoted from the *Anderson* opinion.

However, in 1949, Judge Folta, the trial court in the instant case rendered an opinion in *Martensen v. Mullaney,* 85 Fed. Supp. 76 (1949) in which he called attention to the fact that the previous decisions appear to have overlooked the Civil Rights Act (8 U.S.C.A. Sec. 41) which expressly extends to all citizens within the jurisdiction of the U. S., either in states or territories, and guarantees that they shall be subject to like "taxes, licenses, and exactions of every kind, and to no other". This is clearly a right granted by Congress within the

language of this Circuit Court in the second *Freeman* decision (62 Fed. (2d) 291) where discussing the holding in the *Haavik* case it is said that decision was:

> "*not* decisive of the right of the territorial legislature (under the act of June 6, 1924) to so discriminate between citizens of the U. S. who are residents and those who are non-residents of Alaska *where both have been granted a right by Act of Congress*" (p. 293, italics supplied).

Such being the situation the instant legislation must be appraised on exactly the same basis as similar legislation by a State, and the narrow restraints of the *Anderson v. Smith* (*supra*) decision are not the proper test. This makes the recent decision in the case of *Toomer v. Witsell* (*supra*), and the language therein contained pertinently applicable. The *Toomer* case involved a State law imposing a license fee of $25.00 on resident, and $2500.00 on non-resident shrimp boats. The decision held the law invalid under the privileges and immunities clause of Art. 4, Sec. 2 of the Constitution, but implies a like result could be reached under the uniformity and equality provisions of the 14th Amendment. Referring to Art. 4, Sec. 2 the opinion states:

> ". . . the purpose of that clause . . . is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."

and continues,

> ". . . The State is not without power, for example, to restrict the type of equipment used in its fish-

eries, to graduate license fees according to the size of the boats, *or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose* or for any conservation expenditures from taxes which only residents pay. (p. 398, italics supplied).

In *Martinsen v. Mullaney* (*supra*), Judge Folta, in holding the indentical law here under consideration to be invalid, the court stated:

> "*The act is clearly a revenue measure.* Indeed, the Territory is prohibited by Section 3 of the Organic Act, 37 Stat. 512, 48 U.S.C.A. 24, from regulating the fisheries. Congress has regulated halibut fisheries since June 7, 1924, 42 Stat. 648, and the salmon fisheries of Alaska since 1889, 25 Stat. 1009. The present law regulating the salmon fisheries may be found in 48 U.S.C.A. 221 et seq., and that regulating halibut fisheries in 16 U.S.C.A. 772 et seq." (p. 77-78, italics supplied).

This decision was based upon a stipulation, referring to which the Court says:

> "The stipulation contains no facts tending to justify the discrimination in this case on any ground, such as the difficulty of collecting the tax from non-residents or showing that, considering the tax scheme of the Territory or the distribution of the tax burden, the discrimination is more apparent than real, and of course none can be made on the ground that it is necessary for the conservation of the halibut fisheries because, as has already been pointed out, the Territory is not empowered to regulate the fisheries in territorial waters or on the high seas. In this situation the comment of the Supreme Court in *Colgate v. Harvey,* (296 U.S. 404) p. 422, would appear to be particularly apt:
>
> " 'Upon the face of the statute, the classification is based upon a difference having no substan-

> tial or fair relation to the object of the act which, so far as this question is concerned, simply is to secure revenue. No other public purpose will be served.' "

whereupon the Court reached the conclusion that Chapter 66, S.L.A., 1949, "so far as it imposes a higher tax on non-residents employed or engaged in handling halibut in Alaska, contravenes the Civil Rights Act and, hence, is invalid".

We earnestly submit there is nothing on the face of the statute, and nothing in the record in this case to materially alter the situation from that presented in the *Martinsen* case. There is no clear showing of difference in cost of collection as to resident and non-resident citizens, or of any attempt by the enforcement agency to determine or maintain a record indicating such a difference, so as to meet the test in the *Toomer* case warranting "a differential which would *merely* compensate the State for any added enforcement burden they may impose". Nor is there anything to support the gratuitous suggestion at the close of the trial court's opinion (R. 18) that the act may have been designed to encourage settlement and prefer local enterprise. It appears to be and is, as declared by Judge Folta in the *Martinsen* opinion "clearly a revenue measure", and only matters bearing a fair and reasonable relation to that object can support a discrimination between resident and non-resident.

A moment's reflection on the factual situation reveals the paucity of any argument that the discrimination in-

volved can be justified on the contention that the differential would merely compensate the State for the added enforcement burden that collection from non-resident might involve. Aside from the negative position on this point established in point I of the argument, it is suggested that no revenue measure could be justified which consumed more than twenty per cent in collection; indeed, collection on most such measures falls below five per cent. On the basis of twenty per cent, collection of the resident fee would not exceed one dollar per license. Accepting the government's contention of nine times the cost to collect non-resident fees, a difference in fee of not more than nine dollars could be justified. The difference in the tax here involved is five times that great. For the government to justify the difference in tax here involved it is driven to the absurd position that the entire tax is consumed in collection cost, as the tax imposed on non-residents is ten times as great as that imposed on residents.

B. The Act Is Invalid as a Burden on Interstate Commerce.

It is fully recognized that the business of the companies engaged in salmon packing is entirely interstate. *McComb v. Consolidated Fisheries Co.,* 174 Fd. (2d) 74 (1949). The act involved covers any person who fishes commercially for salmon etc. and includes every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery product, whether such participation be on shore or as an employe or otherwise, and also includes

trap watchermen or others engaged in operating fish traps as well as crews of tenders or other floating equipment used in handling of fish. It prohibits the purchase of fish from an unlicensed person.

It may be that the interstate commerce clause (Const. Art. 1, Sec. 8) was not violated in the *Toomer* case for the reason that the taxable event — in that case the taking of the shrimp -- occurs before the shrimp have entered the flow of commerce. But in the instant case the tax is much broader and applies to enumerable personnel in addition to the actual fishermen or boat operators. Sizeable numbers are covered who assist the product in its process through the industry which is admittedly interstate in character.

A State tax upon a corporation doing only an interstate business may be held invalid because levied (1) upon the privilege of doing interstate business within the case, or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself. *Memphis Natural Gas Co. v. Stone,* 334 U.S. 314 (1948); *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 1131 (1920); *Atlantic and Pacific Telegraph Co. v. Philadelphia,* 190 U.S. 160 (1903). While the instant tax is levied against the individuals employed and engaged in the interstate business, the cannery companies are prohibited from employing or doing business with unlicensed individuals, and thus the interstate business is directly encumbered and burdened. *Fisher's Blend Station v. Tax Commission,* 297 U.S.

650; *Puget Sound Stevedoring Co. v. State Tax Commission,* 302 U.S. 90; *Gwin, White & Prince v. Henneford,* 305 U.S. 434; *Freeman v. Hewitt,* 329 U.S. 249; *Albuquerque Broadcasting Co. v. Bur. of Rev.* (N.M., 1949, 184 Pac. 2nd 416).

CONCLUSION

For the foregoing reasons it is respectfully submitted (1) that the decree of the District Court should be reversed to the extent that it holds Chapter 66, Session Laws of Alaska, 1949, as a valid Act, and (2) that the case should be remanded to the court for entry of a decree enjoining appellee from further collection of taxes under said Act, particularly with respect to non-residents, and directing the refund of taxes heretofore illegally collected thereunder.

WILLIAM PAUL, JR.,
ROY E. JACKSON,
CARL B. LUCKERATH
Attorneys for Appellant

APPENDIX A.

Chapter 66, Session Laws of Alaska, 1949:

* * *

"Section 1. For the purposes of this Act, 'fishermen' shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish."

"Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fishermen, $5.00; non-resident fishermen, $50.00 * * *."

"Section 3. Licenses to fish shall be issued by the Tax Commissioner pursuant to written applications containing such information as may be required by the Tax Commissioner, and such licenses may also be issued by his deputies. * * *".

"Section 4. The Tax Commissioner is hereby authorized to appoint United States Commissioners, cannery or cold storage agents, fish buyers or other persons as his agents to take applications, issue the licenses and collect license fees hereunder, and with respect to such persons not employed on salary by the Tax Department, the Tax Commissioner is hereby authorized to establish reasonable and uniform rates of compensation for such services on a commission basis for issuance of each resident and non-resident license. * * *".

"Section 5. It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. * * *. Any one violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction, punishable under the penalty clause of this Act."

"Section 6. * * * (b) Licenses shall be subject to inspection, and shall, upon request by an officer authorized to enforce this Act, be exhibited by him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding $500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment."

"Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes. * * *".

APPENDIX B.

Civil Rights Act, R.S. 1977, 8 U.S.C.A. 41:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."